IN THE SUPREME COURT

Appeal from the Attorney Discipline Board

Grievance Administrator,
Attorney Grievance Commission,
State of Michigan,

Petitioner-Appellant,

Supreme Court No. 127547
ADB Case No. 01-55-GA

-vs-

Geoffrey N. Fieger, P-30441,

Respondent-Appellee.
_____/

APPELLANT'S REPLY BRIEF

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ARGUMENT

I

Lawyers, by virtue of their status as officers of the court, must not engage in discourteous criticism of the judiciary while a case is pending.

One will search Respondent's brief in vain for any sense that as a lawyer he belongs to an ancient and learned profession and is an officer of the court. Respondent's legal universe apparently has no room for civility or duty, beyond those duties owed to a client. All relationships have shriveled to become essentially political and adversarial. What else could explain Respondent's observation at the very beginning of his First Amendment analysis, that a nonlawyer would face no legal consequences for saying what Respondent said? Of course it's true; true, and completely beside the point.

Ignoring the very real differences between a nonlawyer and a lawyer who is actively engaged in a pending case is simply giving an absolute gloss to the First Amendment, and pretending that it operates with uniformity, everywhere and always, regardless of the circumstances. The case law does not support such an interpretation. Furthermore, Respondent's argument overlooks the important part civility plays even in strictly political settings.

The United States Supreme Court, in *Bethel School District No 403 v Fraser*, 478 US 675; 106 S Ct 3159; 92 L Ed 2d 549 (1986), described civility as a "fundamental value" essential to a democratic society. The *Bethel* court noted that

> "in our Nation's legislative halls, where some of the most vigorous political debates in our

> society are carried on, there are rules prohibiting the use of expressions offensive to other participants in this debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of 'impertinent' speech during debate and likewise provides that 'no person is to use indecent language against the proceedings of the House.'"
> *Id.* at 681-82.

The Rules for Michigan's Senate and for its House of Representatives likewise reflect a concern for civility. See, e.g., Senate Rules 1.103, 1.301, 2.206, 3.506, and 3.902; and House Rules 6, 28, and 80. Standard rules of parliamentary procedure such as Robert's Rules of Order also specifically provide for decorum and the avoidance of personality in debate.

Litigation is not just about the determination of specific disputes. Even when private parties are involved there is a public interest in the proceedings. Litigation requires the use of judges, court personnel, and physical facilities, all of which are paid for by tax dollars. The parties themselves typically contribute only a neglible fraction of what it actually costs to hear their dispute. A lawyer who is involved in litigation is necessarily involved in a governmental activity, a sort of involuntary collaboration with the judiciary. It is not unreasonable to expect that lawyers who choose to criticize the judiciary about a case in which the lawyers are involved, and while it is pending, will do so with civility.

II

Neither MRPC 3.5(c) or MRPC 6.5(a) is unconstitutionally vague.

The Comment to MRPC 6.5 acknowledges the impossibility of formulating a rule "that will clearly divide what is properly challenging from what is impermissibly rude." The same problem applies with equal force to MRPC 3.5(c). Nevertheless, this does not automatically doom either of these civility rules on vagueness grounds because the text of each rule is not the sole determining factor.

For example, under Rule 46(b)(1)(B) of the Federal Rules of Appellate Procedure, an attorney is subject to suspension or disbarment from a federal court of appeals for "conduct unbecoming a member of the court's bar." The First Circuit Court of Appeals, in *In Re Bithoney*, 486 F2d 319 (CA 1, 1973), rejected a vagueness challenge to the predecessor rule (which used the same language as the current FRAP 46). Although the Court agreed there might be a "colorable claim" that FRAP 46 was "so indefinite as not to afford sufficient warning of the behavior which is prescribed," the rule's indefinite character was cured by an application of the customs and commonly accepted usages of the legal profession, or what *Bithoney* termed the "lore of the profession." *Id.* at 324, fn 7.

Another, more recent, vagueness challenge to FRAP 46 was rejected by the Seventh Circuit Court of Appeals in *In Re Mann*, 311 F3d 788 (CA 7, 2002). The Court agreed with *Bithoney* that "long

traditions and compiled rules of the legal...[profession] flesh out the elliptical 'conduct unbecoming' standard." *Id.* at 790.

The *Bithoney* rationale was cited with approval by Chief Justice Burger in *In re Snyder*, 472 US 634; 105 S Ct 2874; 86 L Ed 2d 504 (1985). Chief Justice Burger wrote that the phrase "conduct unbecoming a member of the bar" in FRAP 46 "must be read in light of the 'complex code of behavior' to which attorneys are subject." *Id.* at 644. He then continued as follows:

> "Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed: 'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *Id.*

Courts have tolerated limitations on the First Amendment rights of members of a precisely defined group when the government has a substantial interest in their behavior. For example, in *Parker v Levy*, 417 US 733; 94 S Ct 2547; 41 L Ed 2d 439 (1974), the United States Supreme Court rejected a vagueness challenge to the provisions in the Uniform Code of Military Justice punishing "conduct unbecoming an officer and a gentleman" and "to the prejudice of good order and discipline in the armed forces." 417 US at 757. In *Brown v City of Trenton*, 867 F2d 318 (CA 6, 1989), the Sixth Circuit Court of Appeals rejected a vagueness challenge to a code of police conduct which prohibited police officers from publicly criticizing orders given by a superior office, and communicating detrimental information to any person concerning the

business of the police department. In *Davis v Williams*, 617 F2d 1100 (CA 5, 1980), the Fifth Circuit Court of Appeals rejected a vagueness challenge to a fire department regulation prohibiting conduct prejudicial to good order.

The Supreme Court's interest in the behavior of attorneys it has licensed is at least as substantial as a government's interest in the behavior of its soldiers, police officers, and firefighters.

The legitimate sweep of Michigan's civility rules is plain. "All persons involved in the judicial process-judges, litigants, witnesses and court officers-owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious settling of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone." *In re Snyder*, 472 US 634, 647; 105 S Ct 2874; 86 L Ed 2d 504 (1985).

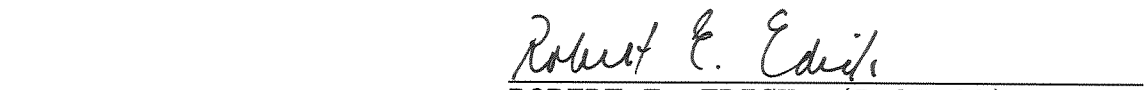
Respondent did not have to guess about whether he violated the civility rules. He pleaded no contest. The Attorney Grievance Commission and the three members of the hearing panel approved Respondent's plea. Five out of the eight Board members agreed that his conduct violated the rules. Even the three other Board members who authored the plurality opinion admitted "the statements made by Respondent are patently discourteous and disrespectful." (p. 9). Not counting Respondent himself, the twenty people in the disciplinary system with some official connection to this matter have had no problem understanding that Respondent's conduct was discourteous.

Respondent's conduct clearly falls within even the narrowest construction of both MRPC 3.5(c) and MRPC 6.5(a).

Dated: January 20, 2006

Respectfully submitted,

By:



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